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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

vs.

LEE ROY BLACK, Commissioner,
Mississippi Department of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where the only eyewitnesses who testified against a prisoner at trial gave material false testimony on the stand and, contrary to their trial testimony, could not identify Petitioner Willie Albert Smith as a participant in the crime, is it appropriate for a court to refuse to consider that prisoner's challenge to his conviction on the sole ground that the prisoner has failed to prove prosecutorial knowledge of the perjury?

2. Should a court refuse to find a due process violation when a prosecutor negligently uses material perjured testimony, in light of the fact that it is clearly established law under Brady v. Maryland and its progeny that the negligent suppression of material

evidence is an adequate ground for a due process claim?

3. Should a federal court apply the non-retroactivity principle enunciated in Teague v. Lane to a rule of law referenced in Clemons v. Mississippi, when the principle from Clemons upon which Petitioner relies was (a) established by state law prior to Clemons; (b) settled law years before Petitioner's conviction; and (c) the cure for an independent error?

4. Does the non-retroactivity principle enunciated in Teague v. Lane apply to a change in state law?

5. Should a federal court apply the non-retroactivity principle of Teague v. Lane where the state legislature has legislated a result directly contrary to Teague?

6. Does the fundamental protection against execution without individualized consideration implicate bedrock procedural elements crucial to the accuracy of a death sentence, and therefore constitute an exception to Teague?

7. Does the State waive its right to rely upon the Teague v. Lane defense when it fails to raise the defense on its own in any of its briefs to any court and only thereafter relies upon the defense when raised by the Court of Appeals sua sponte?

PARTIES TO THE PROCEEDING

The petitioner in this action is Willie Albert Smith. The respondents in this action are Lee Roy Black, Commissioner, Mississippi Department of Corrections, Steven Puckett, Superintendent, Mississippi State Penitentiary, and the State of Mississippi.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIE ALBERT SMITH,

Petitioner,

v.

LEE ROY BLACK, Commissioner, Mississippi Dept. of Corrections, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Willie Albert Smith ("Petitioner"), requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Smith v. Black, 904 F.2d 950 (5th Cir. 1990). Petitioner is currently under sentence of death in the State of Mississippi.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the

Southern District of Mississippi, dated June 26, 1990, is reported at 904 F.2d 950 (5th Cir. 1990), and is set forth as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying Petitioner's suggestion for rehearing en banc and petition for rehearing, dated August 24, 1990, is reported at 912 F.2d 1465 (5th Cir. 1990), and is set forth as Appendix B.

The order of the District Court of the Southern District of Mississippi, dated June 13, 1988, is reported at 689 F. Supp. 644 (S.D. Miss. 1988), and is set forth as Appendix C.

JURISDICTION

The orders of the United States Court of Appeals for the Fifth Circuit were entered on June 26, 1990 and August 24, 1990. On November 12, 1990, Petitioner sought, and this Court granted, an

extension of time to file this petition for writ of certiorari. This petition is filed within the extension granted by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Eighth and Fourteenth Amendments to the United States Constitution, which provide, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves §§ 99-39-27(9) and 99-39-23(6) of the Mississippi Code, which are set forth as Appendix H.

STATEMENT OF THE CASE

Events of March 15, 1981

At approximately 5:00 a.m. on the morning of Sunday, March 15, 1981, about an hour before dawn, Kenneth Thomas and James Wells were driving by a Tote-Sum convenience store in Jackson, Mississippi (E43-49, 64-65; F110-14).[1/] They later testified that they saw a black man struggling with a white woman in the parking lot of the store, near a small red car (E45-51, 64-67; F16-18, 102-05, 110-14). The struggling figures were at least 60 feet away from the moving car (F61-66). The man's body was obstructed from view (F41-46). Wells was drunk (F19-26).

Thomas and Wells kept driving (E45-53). After searching for a store to cash

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1/ All cites (e.g., A1, B1) refer to the separately bound appendix submitted herewith.

a check (E43-49, 64-65), they drove back by the Tote-Sum store, where they saw Sgt. Oatis of the Jackson police in the parking lot (E54-55, 68-71, 88-91). As the police radio report and Oatis' notes confirm (F91-101, 145-50), Thomas told Oatis all that he had seen: a black man struggling with a white woman near a small red car (E64-67; F110-14).

Approximately forty-five minutes later, at 5:45 a.m., a Ford Pinto automobile approached the store, turned around and began to drive away (E92-93). Sgt. Oatis stopped the car and saw a tennis shoe inside matching one he had seen in the parking lot. He arrested the driver, Petitioner (E92-102).

Petitioner told Sgt. Oatis the car belonged to Edward Charles McDonald, who lived near Petitioner's home. The police took Petitioner to McDonald's house

(E107-08). McDonald admitted that it was his car. He said that he and others had been at a party with Petitioner until about 4 a.m., when he loaned the car to Petitioner and went home to bed. He took the police to Petitioner's house (E107-08), which was within walking distance. The police entered and found Mrs. Robert's purse, sweater and other personal belongings. They found her body in a wooded area some distance away (F106-09).

The Failed Lineup

The next day, the police took Thomas to a line-up that included Petitioner. Thomas could not identify him. Wells was not even asked to try to identify anyone. Thomas and Wells gave statements to the police stating that they could not identify the man in the Tote-Sum parking lot (F75-77, 84-86).

Pretrial Proceedings

Petitioner was subsequently indicted for robbery-murder, a capital crime. His family retained John Gregg to defend him. The prosecutor for Hinds County was district attorney Ed Peters.

Gregg asked for discovery of all exculpatory materials in the State's files, including the names of any informants who were eyewitnesses. He received a few excerpts from the police report, but he was not given the written statements by Thomas and Wells that they could not identify Petitioner. He was also not given the police records showing that Thomas and Wells told Sgt. Oatis that all they had seen was a black man with a small red car. Nor was he told that Kenneth Thomas was an informant for the Jackson police.

Until the day before trial, Peters had a circumstantial case. While there was some physical evidence tying the victim to Petitioner's apartment, Peters did not have any eyewitness evidence proving that Petitioner abducted Mrs. Roberts, or was involved in her death. At the coram nobis hearing, Peters testified that he was well aware that the absence of eyewitness testimony linking Petitioner to the crime was a problem, because jurors place great weight on eyewitness testimony (F78-80).

When jury selection began on July 27, 1981, Peters still did not have an eyewitness to the crime. The trial jury included four jurors who swore during the voir dire they would not convict Petitioner without eyewitness testimony tying him to the crime (E7-28, 39-42; F78-83).

Thomas and Wells See the Light

While Peters was facing this problem, an investigator for the district attorney, Lt. Bartlett, was solving it for him. Bartlett talked to Thomas and Wells. He questioned Thomas about his inability to identify Petitioner. When Thomas again said he could not identify the man in the parking lot, Bartlett took out five pictures. One of them was of Petitioner (F47-55). Each picture had a name on the back (id.; F120-22). Thomas looked at them and chose the picture of Petitioner by the name on the back (F10-15, 51-55). Bartlett then took Wells aside and told him Thomas had not been able to identify the man. Wells knew the name of the defendant. He chose the picture of Petitioner by the name on the back (F27-40, 125-26).

Bartlett took Thomas and Wells to meet Peters and Assistant District Attorney Vaughan Davis. Bartlett told Peters and Davis that Thomas and Wells would supply the necessary eyewitness testimony. Thomas had an additional incentive to please the prosecutors. He was serving a 22 year probation for armed robbery and was a police informer.

Both Davis and Peters had read the police report. They knew that it was an hour before dawn when Thomas and Wells drove by the Tote-Sum parking lot, that Thomas and Wells had repeatedly said they could not identify the man in the parking lot, and that Thomas could not pick him out of a lineup the day after the crime. However, neither Peters nor Davis questioned Thomas' and Wells' sudden conversion.

The State's Continuing Failure to Disclose Exculpatory Information

Even after Peters had his eyewitness testimony, he did not give Gregg the police reports that showed (i) that Thomas and Wells could not identify anyone the day after the crime, and (ii) that all Thomas or Wells told anyone was that they saw a black man, whom they could not otherwise describe, near a small red car. Nor did he tell Gregg that Thomas was an informant for the Jackson police.

The Trial: The In-Court Identification

Both Thomas and Wells took the stand at the trial, pointed to Petitioner and said that he was the man they saw in the Tote-Sum parking lot (E58-61, 72-73). They did not show any doubt about the identification (E60-61, 82-83).

Gregg's cross-examination was crippled. While he had reports of

interviews of Thomas and Wells by his son and Petitioner's sister, in which Thomas and Wells said they could not identify Petitioner, Gregg did not have Thomas' and Wells' written statements and the police reports contradicting their testimony. He also did not know that Thomas was a police informant.

As he had at an earlier suppression hearing, Petitioner testified and denied guilt and any involvement in the crime.

Summations

Reflecting the importance of eyewitness evidence, both sides discussed the testimony at length during summation. Gregg's summation was devoted almost entirely to an attack on the credibility of Thomas and Wells.

The prosecutor told the jury, among other things, that it should credit the testimony of Thomas and Wells. To rebut

Gregg's claim that Thomas and Wells were influenced by an improper photo show-up, Assistant District Attorney Davis referred to Wells' testimony that he had been left alone in the room with the pictures (E118-20). This despite the fact Lt. Bartlett, who was in the courtroom during Wells' testimony, later testified that Wells was never left alone in the room (E62-63, 78-81; F115-22). The State did not tell the jury that the pictures had names on the back (E118-20).

The Sentencing Hearing

The jury found Petitioner guilty of robbery-murder, based on the perjured testimony. But the prosecutor had to convince the jury to sentence Petitioner to die. The perjured testimony was a significant boost, since the same jury that determined guilt would determine sentence. They had seen and heard Thomas

and Wells point to Petitioner and say, "That's the man."

However, even with the eyewitness testimony, the prosecutor was concerned about removing any residual doubts the jury harbored from the guilt phase that would make them less likely to sentence a man to die. Substantial additional evidence, including evidence of the uncharged crime of rape, was introduced during the sentencing phase of the trial.

The court instructed the jury that it must find any mitigating circumstances outweighed by at least one of three aggravating factors: that the murder was committed during a robbery, for pecuniary gain or that it was "especially heinous, atrocious or cruel". No instruction was given explaining or limiting these terms (E121-27). On July 30, 1981, the jury returned a sentence of death.

Post-Trial Proceedings

Petitioner's conviction was affirmed. Smith v. State, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983). A motion in the State Court for leave to file a petition for writ of error coram nobis was denied. Smith v. State, 434 So. 2d 212 (Miss. 1983). Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Mississippi, Jackson Division, CA-J83-0573(B), in August, 1983.

Counsel for Petitioner thereafter obtained evidence showing that the State's two alleged eyewitnesses perjured themselves at the trial. Petitioner sought and was granted permission to file a petition for writ of error coram nobis in the state court based on evidence of perjury by the only two alleged

eyewitnesses. In re Smith, 457 So. 2d 911 (Miss. 1984). After a hearing in the Circuit Court of Hinds County, the petition was denied. On appeal, the Mississippi Supreme Court unanimously determined that the two eyewitnesses perjured themselves at trial. The court held, however, that the perjured testimony by the State's only eyewitnesses was harmless error. Smith v. State, 492 So. 2d 260, 264-67 (Miss. 1986). In August, 1985, based on information learned after filing the petition, Petitioner moved in the Mississippi Supreme Court for post-conviction relief on two other issues: (1) the prosecutor's racially discriminatory use of peremptory challenges; and (2) the prosecutor's failure to produce the police file at or before trial which would have revealed

exculpatory material, in violation of Brady v. Maryland, 373 U.S. 83 (1963). The motion was denied. Smith v. State, 500 So. 2d 973 (Miss. 1986).

In April, 1987, Petitioner filed an amended petition for writ of habeas corpus in the District Court pursuant to 28 U.S.C. § 2254. On June 13, 1988, without argument or an evidentiary hearing, the District Court denied the petition. Smith v. Thigpen, 689 F. Supp. 644 (S.D. Miss. 1988). Petitioner's Motion to Alter or Amend the Judgment was denied on August 26, 1988. The Fifth Circuit affirmed the District Court's decision. Smith v. Black, 904 F.2d 950 (5th Cir. 1990).

On July 30, 1990, Petitioner filed an application for leave to file a motion to vacate or set aside the death sentence in the Mississippi Supreme Court, and

simultaneously filed a motion to defer proceedings in the Fifth Circuit.

On August 24, 1990, the Fifth Circuit denied Petitioner's motion to defer proceedings, suggestion for rehearing en banc and petition for rehearing. Smith v. Black, 912 F.2d 1465 (5th Cir. 1990).

Petitioner's application for leave to file a motion to vacate or set aside the death sentence is still pending in the Mississippi Supreme Court. The stay of execution remains in effect.

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S USE OF PERJURED EYEWITNESS TESTIMONY VIOLATED PETITIONER'S RIGHT TO DUE PROCESS OF LAW

The court below held that the State's continued reliance upon perjured testimony after a witness has credibly recanted material testimony does not amount to constitutional error in the absence of affirmative prosecutorial

misconduct at the time the perjured testimony was given. Smith, 904 F.2d at 961-962 (A29-34). This holding conflicts directly with the better reasoned opinion of the Second Circuit in Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988) (when material eyewitness testimony is later credibly recanted, due process is violated, even where there is no evidence of prosecutorial misconduct). The decision below is also inconsistent with the requirements set forth in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

A. The Opinion Below Conflicts With The Better Reasoned Second Circuit Decision of Sanders v. Sullivan

The court below holds that "for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction." Smith, 904 F.2d at

961 (A29). The court, therefore, declined to set aside either the conviction or the sentence of death, even though both were based on the same perjured testimony. This holding contradicts Sanders v. Sullivan, 863 F.2d 218, 222 (2d Cir. 1988), in which the Second Circuit held that despite evidence of prosecutorial misconduct, a defendant is denied due process when "a credible recantation of the testimony in question would most likely change the outcome of the trial and a state leaves the conviction in place."[2/] The Sanders case

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2/ This continues to be the established law of the Second Circuit. See e.g., Sanders v. Sullivan, 900 F.2d 601, 605 (2d Cir. 1990); United States v. Bortnovsky, 879 F.2d 30, 33 n.4 (2d Cir. 1989); Buitrago v. Scully, 705 F. Supp. 952, 957 (S.D.N.Y. 1989).

The decisions among the other circuits vary widely on this issue. Compare Curran v. Delaware, 259 F.2d 707, 713 (3d Cir. 1958), cert. denied, 358 U.S. 948 (1959); Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938)

(continued...)

deals only with a conviction and not with a jury-imposed sentence. The Fifth Circuit itself explicitly takes note of the circuit conflict. Smith, 904 F.2d at 962 (A35).

1. Petitioner's conviction was founded upon material perjured testimony which was credibly recanted

Petitioner's case falls squarely within the area of conflict between the Second and Fifth Circuits. The perjured eyewitness testimony can only have had a great impact upon the outcome of both the guilt and sentencing phases of Petitioner's trial. Further, the credibility of the recantations of Thomas and Wells has been clearly established. This is therefore an appropriate case in

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2/(...continued)
with Burnett v. Illinois, 619 F.2d 668, 674 (7th Cir.), cert. denied, 449 U.S. 880 (1980); Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975).

which to resolve the circuit conflict outlined above.

Thomas and Wells were the only two eyewitnesses to testify at Petitioner's trial. Their testimony had a striking impact on both Petitioner's conviction and sentence. Four jurors, during the process of jury selection, said that they would not convict the Petitioner in the absence of eyewitness testimony (E7-28, 39-42). Further, the prosecutor who tried the case later testified at a hearing before the trial court that he could not get a death sentence without eyewitness testimony (F78-83).[3/]

3/ Such statements only serve to underscore the generally accepted principle that eyewitness testimony has a dramatic effect on the minds of jurors. See Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J. dissenting) (citing E. Loftus, Eyewitness Testimony at 19 (1979)); see also United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986), cert. denied, 483 U.S. 1008 (1987); Kampshoff v. Smith, 698 F.2d 581, 587 (2d Cir. 1983).

This eyewitness testimony is also the only evidence tying Petitioner to the scene of the initial abduction of the victim. Without the perjured testimony of Thomas and Wells, the only description of the perpetrator at the Tote-Sum store is that he was a black male driving a small red car. Petitioner denied at trial that he had any involvement in the crime. Absent the eyewitness testimony, the trial evidence is consistent with this position as well as the participation of one or more other people. For example, the evidence is consistent with Edward Charles McDonald's presence and participation in the abduction -- indeed, McDonald owned the "small red car." Moreover, given the distances and other details of the crime, the participation of more than one person in the abduction and murder is likely.

Under the prosecution's theory of the crime, Smith abducted Mrs. Roberts at approximately 5 a.m., forced her into the Pinto, drove the three miles back to his home in a car that was largely incapable of high speeds, robbed her, raped her repeatedly, strangled her, dragged her body out of the house seventy-five yards into the woods, and returned to the scene of the crime within 45 minutes (E103-04, 105-06, 109-10, 116-17; F95-101). Both the statement of the jurors regarding the necessity of eyewitness testimony and the lack of other evidence connecting Petitioner with the scene of the abduction make clear that the eyewitness testimony purporting to establish that Petitioner abducted Mrs. Roberts from the Tote-Sum store is highly material to his conviction, as well as to his sentence.

It is equally clear that this testimony was credibly recanted by both Thomas and Wells. The Mississippi Supreme Court found that the recantations were sufficient to establish that Thomas and Wells perjured themselves at trial. Smith v. State, 492 So. 2d 260, 264 (Miss. 1986).[4/] Similarly, the Fifth Circuit stated that the testimony of Thomas and Wells "is cast into the severest doubt by their after-trial recantations. . . ." Smith, 904 F.2d at 962 (A33). A circuit conflict is

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4/ The court held that "the evidence adduced at the [coram nobis] hearing clearly shows one thing -- Thomas and Wells lied when they made the in-court identifications of Smith as the assailant they saw that morning." Id. Judge Barbour, in turn, held that he did not need to determine whether Thomas and Wells lied. Smith, 689 F. Supp. at 657 (C59) ("it is immaterial whether the identifications were in fact perjury"). Moreover, federal courts must presume the correctness of fact findings by state appellate courts, particularly when the federal court is reviewing the same record considered by the state court. Sumner v. Mata, 449 U.S. 539, 547-49 (1981).

therefore directly presented in this case.

2. The Sanders decision is better reasoned, as it focuses upon fairness to the accused, not upon prosecutorial culpability

This Court stated in United States v. Agurs, 427 U.S. 97, 110 (1976), that the correct focus in suppression of evidence cases is upon "the character of the evidence, not the character of the prosecutor." The Court made a similar statement in Brady v. Maryland, 373 U.S. 83, 87 (1963) (focus is upon the materiality of the evidence suppressed).

Further, both Agurs and Brady explicitly hold that the level of culpability of the prosecutor is irrelevant in determining whether there has been a due process violation. See Agurs, 427 U.S. at 110 ("[n]or do we believe the constitutional obligation is measured by the moral culpability or the

willfulness of the prosecutor"); Brady, 373 U.S. at 87 (suppression violates due process "irrespective of the good faith or bad faith of the prosecution"). In fact, Brady construes Mooney v. Holohan, 294 U.S. 103 (1935), the primary case relied upon by the Fifth Circuit, as holding that prosecutorial misconduct is irrelevant to the determination of a due process violation. The Brady Court stated that "[t]he principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." 373 U.S. at 87. This statement indicates the Court's previous determination that the use of material perjured testimony constitutes a violation in the absence of prosecutorial misconduct.[5/]

5/ Other courts and commentators agree. See, e.g., Sanders v. Sullivan, 863 F.2d 218, 224 (continued...)

Moreover, whatever its utility, proving prosecutorial misconduct is extraordinarily difficult. Absent a prosecutor's admission that he knowingly used perjured testimony, circumstantial evidence must be used to rebut the prosecutor's claims of his own innocence.[6/] Further, the line between prosecutorial involvement and innocence in the subornation of perjury is not always clear. One commentator argues that incentives to

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5/(...continued)
(2d Cir. 1988); Jones v. Kentucky, 97 F.2d 335, 338 (6th Cir. 1938); Riley v. State, 93 Nev. 461, 567 P.2d 475, 476 (Nev. 1977); Comment, Rethinking the Standard for New Trial Motions Based Upon Recantations as Newly Discovered Evidence, 134 U. Pa. L. Rev. 1433, 1447-49 (1986); Note, I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases, 83 Mich. L. Rev. 1925, 1934 (1985)(hereinafter "False Testimony"); Carlson, False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?, 1969 Duke L.J. 1171, 1187; Murray, Convictions Obtained by Perjured Testimony: A Comparative Review, 27 Ohio State L. J. 102, 106 (1966).

6/ See Carlson at 1185; Murray at 107.

testify, while apparently innocent offers by the prosecutor, may encourage the use of perjured testimony.[7/]

3. The rationales for requiring evidence of prosecutorial misconduct are unconvincing

The two primary arguments against applying due process principles to instances of perjury in the absence of prosecutorial misconduct -- that the unknowing use of perjury by the prosecution does not constitute "state action" and that such a rule would undermine the finality of convictions -- are not persuasive.

Whatever the knowledge of the prosecution at the time of trial, the Mississippi Supreme Court has found that perjury occurred at Petitioner's trial. The State is thus on notice that it tried, convicted, continues to

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7/ See False Testimony at 1942-43.

incarcerate and plans to execute a man whose conviction and sentence are based on perjured eyewitness testimony. As it has been established that state complacency in the face of clear injustice can fulfill the state action requirement, Baker v. Carr, 369 U.S. 186 (1962); Cuyler v. Sullivan, 446 U.S. 335 (1980), there is ample evidence on this record to find that the state action requirement has been met.[8/]

With respect to the finality of judgments, it must be remembered that before a conviction can be overturned, evidence of perjury must be convincingly presented. Moreover, the perjury in question must be material in order for a court to find a constitutional error.

8/ See Durley v. Mayo, 351 U.S. 277, 291 (1956) (Douglas, J., dissenting); Sanders, 863 F.2d at 224. The commentators agree. See, e.g., Murray at 106.

Thus, including all perjury within the ambit of due process protection would have only a slight impact upon the finality of judgments. Sanders, 863 F.2d at 225.

B. The Prosecutor's Negligent Use Of Material, Perjured Eyewitness Testimony Violated Due Process

1. The Fifth Circuit's reliance upon Mooney to justify its refusal to correct the due process violation in this case is inappropriate

In the opinion below, the court cited Mooney for the proposition that in order "for use of perjured testimony to constitute constitutional error, the prosecution must have knowingly used the testimony to obtain a conviction." Smith, 904 F.2d at 961 (A29). However, this interpretation of the holding in Mooney is inaccurate. In Mooney, the Court held that due process was violated when a prosecutor knowingly used perjured

testimony. However, nothing in the Mooney decision limits the holding to the intentional use of perjury. The opinion does not mention the unintentional use of perjured testimony because such a situation was not presented. In fact, the Court stated, in sweeping language, that due process "in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." Mooney, 294 U.S. at 112.

Further, courts which limit Mooney to cases of prosecutorial knowledge of perjury generally do so without articulating their reasons. This is particularly true of the opinions of the

Fifth Circuit.[9/] Those opinions that have justified the Mooney "rule" have relied upon those rationales discussed and criticized supra Point I.A.3. See, e.g., Burks v. Egeler, 512 F.2d 221, 229 (6th Cir.), cert. denied, 423 U.S. 937 (1975). Thus, the Mooney decision does not provide a strong basis for the Fifth Circuit's rule limiting due process relief to cases of intentional use of perjury.

2. A refusal to afford due process relief when perjured testimony has been negligently used creates an explicit conflict with Brady and its progeny

The line of cases starting with Brady adopt a sliding scale approach to the issue of what level of prosecutorial

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9/ See, e.g., Hawkins v. Lynaugh, 844 F.2d 1132, 1141 (5th Cir.), cert. denied, 488 U.S. 900 (1988); Braxton v. Estelle, 641 F.2d 392, 395 (5th Cir. Unit A 1981); Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.)(per curiam), cert. denied, 444 U.S. 974 (1979).

culpability is necessary to make out a valid due process claim. These cases hold that as the materiality of improper evidence increases, the scienter requirement decreases.[10/] Thus, in the context of suppressed evidence, courts have held that negligent conduct may give rise to a due process violation.

Moreover, the Brady line of cases has implicitly held that Mooney should be interpreted as applying a negligence standard, stating that "[t]he principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Brady, 373 U.S. at 87.

As the Brady opinion indicates, the Brady doctrine itself springs from the

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10/ See United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972).

Mooney decision. In fact, the Court has construed the use of perjured testimony as being encompassed by the Brady doctrine because Mooney, like Brady, addresses the problem of the submission of improper evidence to the jury. The Court has therefore held that the use of perjured testimony comprises one of the "tests" under the Brady line. See United States v. Agurs, 427 U.S. 97, 103-04 (1976).

None of the cases in the Brady line address why the negligent use of perjured testimony should be different from, for example, negligently suppressed evidence. Therefore, cases that limit Mooney's holding to the knowing use of perjured testimony fail to confront what amounts to a gap or inconsistency in the law governing prosecutorial misconduct. Moreover, several courts have recognized

that the Brady line of cases reflects this Court's belief that the withholding of exculpatory or impeachment evidence is just another variation on the use of perjured testimony to obtain a conviction.[11/]

3. The prosecution negligently used perjured eyewitness testimony to obtain both a conviction and a jury-imposed sentence of death

Circumstantial evidence that the prosecutor at Petitioner's trial did actually know that the only two eyewitnesses were lying is overwhelming.[12/]

11/ See Shuler v. Wainwright, 491 F.2d 1213, 1220 n.22 (5th Cir. 1974); Jackson v. Wainwright, 390 F.2d 288, 295 (5th Cir. 1968); see also United States v. Bagley, 473 U.S. 667, 678-80 (1985) (citing Agurs).

12/ (1) The pictures from which Thomas and Wells ultimately identified the Petitioner had the Petitioner's name on the back (F115-22);

(2) Thomas' and Wells' trial testimony was inconsistent with their prior knowledge, recorded on at least four

(continued...)

12/(...continued)

separate occasions: the radio broadcast, their signed statements, the failed lineup, and interviews by Petitioner's relatives (E74-77, 82-83; F56-60, 87-90, 110-14, 133-35, 145-50);

(3) Thomas and Wells repeatedly stated to police and prosecutors that they did not get a good enough look at the perpetrator to identify him (F1-9, 67-71, 130-32, 136-38);

(4) Wells was not given a chance to identify Petitioner at the failed lineup because the district attorney elected not to ask him to pick out the perpetrator after Thomas had failed to identify the Petitioner (E84-85; F136-38);

(5) by the time Thomas and Wells finally identified Petitioner, his name and face had appeared frequently in the local media (E1-6, 29-30, 31-34, 35-38);

(6) at the time of his sudden realization that he could identify Petitioner, Thomas was a police informant on 22 years probation for armed robbery, making him peculiarly susceptible to prosecutorial pressure (E56-57; F72-74, 139-44);

(7) the police report reflects that the police officer whose written report contained Thomas' and Wells' "detailed

(continued...)

Moreover, there was direct evidence that the prosecutor was willing to mislead the jury through false testimony if it would bolster the State's case.[13/] These facts demonstrate that whether or not Petitioner met the Fifth Circuit's test

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12/(...continued)

observations" of the perpetrator and his vehicle failed to convey those observations when he broadcast a description of the alleged perpetrator and vehicle immediately after speaking with Thomas and Wells (F145-50) (This report was not available to Petitioner's trial counsel. (See Smith, 904 F.2d at 965 (A48))); and

(8) Petitioner was dressed in a blue prison uniform at the time he was identified in court (E72-73).

While all of the material listed above was known to the prosecutors, only points "(5)" and "(8)" were known to the jury.

13/ The prosecutor allowed Wells to testify that he had been left alone to review Petitioner's photograph (E86-87), and even argued this point in his closing argument in support of Wells' credibility (E118-20), although the investigating officer, Bartlett, who was present in the courtroom at the time of Wells' testimony, testified that this was not true (E62-63, 78-81; F115-29).

for establishing prosecutorial knowledge, he certainly established that the prosecutor negligently used perjured testimony, and his due process rights were accordingly and undeniably violated.

There is simply no justification for simultaneously applying a negligence standard to the suppression of evidence and a knowledge standard to the use of perjured testimony. Petitioner submits that this anomaly has been created by historical accident and respectfully suggests that the Court grant certiorari to determine that the negligent use of perjured testimony constitutes a violation of due process of law.

II. THE FIFTH CIRCUIT ERRED IN FAILING TO REVIEW THE UNCONSTITUTIONAL USE OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE

The jury at Petitioner's trial was charged that it had to find at least one

of the following three aggravating circumstances beyond a reasonable doubt: (1) the murder was committed during a robbery; (2) the murder was committed for pecuniary gain; or (3) the murder was "especially heinous, atrocious or cruel." It was not given any instruction explaining or limiting the term "heinous, atrocious or cruel." (E121-27).

The jury was instructed that it could only sentence Petitioner to death if it found beyond a reasonable doubt that the accumulated aggravating circumstances outweighed the mitigating evidence.

On direct appeal, the Mississippi Supreme Court found no error in the trial court's instruction submitting "heinous, atrocious or cruel" to the jury without any limitation. The Mississippi Supreme Court, therefore, never reached the question of whether the sentence of death

was invalid because this jury instruction violated Godfrey v. Georgia, 446 U.S. 420 (1980). Smith, 419 So. 2d at 568. The Mississippi Supreme Court should therefore be given the opportunity to address this issue, and the Fifth Circuit's failure to give it the opportunity to do so is a violation of the principles of both comity and due process.

In Clemons v. Mississippi, ___ U.S. ___, 110 S. Ct. 1441 (1990), this Court upheld the proposition that even in a "weighing" State like Mississippi, it is constitutionally permissible for an appellate court (as opposed to a jury) to reweigh the aggravating and mitigating circumstances where a jury-imposed death sentence is based in part on an invalid aggravating circumstance. Nevertheless, the Court remanded Clemons to the

Mississippi Supreme Court, because it found that the opinion under review could be read as creating an "automatic" rule that, when an aggravating circumstance relied upon by the jury has been invalidated, the sentence may be affirmed as long as there remains one valid and undisturbed aggravating circumstance. The Court stated that such an automatic affirmance rule in a weighing state would be invalid under Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), for it would not give defendants the necessary individualized treatment that would result from actual reweighing.

The Fifth Circuit's opinion in the present matter holds subject to the non-retroactivity principle announced in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989), that portion of this Court's

Clemons opinion which states that an automatic affirmance rule in a weighing state would be invalid under Lockett and Eddings.[14/] The Fifth Circuit therefore found that it was not necessary to address the fact that Petitioner's jury was allowed to consider the unlimited aggravating circumstance, "especially heinous, atrocious or cruel," which this Court held unconstitutionally vague in Maynard v. Cartwright, 486 U.S. 356 (1988).[15/]

14/ This Court denied petitioner's application for a writ of certiorari to review the Mississippi Supreme Court's denial of his direct appeal on March 21, 1983. See Smith v. State, 419 So. 2d 563 (Miss. 1982), cert. denied, 460 U.S. 1047 (1983). Petitioner is therefore entitled to rely on Lockett and Eddings.

15/ Petitioner continues to maintain that Maynard is available to him because the result was "controlled" by Godfrey. See Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3301 (1990). The Fifth Circuit

(continued...)

This holding fails to take account of pre-Clemons state law, and is also in direct conflict with both the letter and spirit of the Clemons opinion. Moreover, it fails to address the fact that virtually all of the evidence presented by the prosecution during the sentencing hearing was admissible solely in support of the unconstitutional aggravating circumstance, "especially heinous, atrocious or cruel." Further, as two recent decisions of this Court make clear, this portion of Clemons constitutes an exception to Teague v. Lane. Finally, the Fifth Circuit erred in raising the Teague issue sua sponte; Respondent can and has intentionally waived the non-retroactivity defense.

15/(...continued)
did not address this issue. See Smith, 904 F.2d at 983 (A139-41).

A. The Fifth Circuit Is In Direct Conflict With The Mississippi Supreme Court's Ruling In Johnson III

1. Johnson III is the law in Mississippi

The Fifth Circuit's holding that this Court made "new law" in Clemons when it noted the invalidity of an "automatic affirmance" rule, is predicated upon prior Fifth Circuit case law. That prior Fifth Circuit case law includes, "most recently," Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), vacated and remanded, ___ U.S. ___, 110 S. Ct. 1800 (1990), "recognizing the Mississippi practice of sustaining verdicts when supported by at least one valid aggravating circumstance." Smith, 904 F.2d at 984 (A146-47). The Fifth Circuit's reliance on Stringer was erroneous.

In a more recent Mississippi Supreme Court case, Johnson v. State, 547 So. 2d 59 (Miss. 1989) (en banc) (Johnson III), the Mississippi Supreme Court made clear that Stringer had misapprehended Mississippi law, or, at least, that Mississippi law has changed since Stringer.[16/] Specifically, the Mississippi Supreme Court in Johnson III held that, in light of this Court's decision in Johnson v. Mississippi, 486 U.S. 578 (1988), invalidating one of several aggravating circumstances:

> There are two courses open to this Court: (1) remand this cause to the circuit court of Pike County for another sentencing hearing, or (2)

16/ Petitioner has repeatedly argued that Stringer, which preceded both Johnson III and Clemons v. State, 535 So. 2d 1354 (Miss. 1988), misapprehended Mississippi law, and that a much more logical reading of the pre-Johnson Mississippi cases is that the presence of a valid aggravating circumstance may, but, depending upon the individual circumstances, need not, save an invalid aggravating circumstance.

> make the decision ourselves as to whether to reimpose the death penalty or reduce Johnson's sentence to life because of the invalidation of this aggravating circumstance which was considered by the original trial jury.

Johnson III, 547 So. 2d at 59-60. Neither of these "two courses" is an automatic affirmance. Moreover, the Mississippi Supreme Court chose the course of remanding for a new sentencing hearing.

Indeed, when the "automatic affirmance" issue was raised during oral argument before this Court in Clemons, counsel for the State of Mississippi -- the very same counsel who represents the Respondents in this case -- argued repeatedly that Mississippi has no "flat, automatic rule":

> **THE COURT:** Does it [Mississippi] have just a flat, automatic rule, so long as one aggravating circumstance remains, it will affirm a death penalty?

MR. WHITE: No, Your Honor.

THE COURT: No?

MR. WHITE: That has been most recently graphically pointed out in the remand in Johnson v. Mississippi. . . .

THE COURT: But does it have an automatic rule that if there are two aggravating circumstances, and one drops out, that it will affirm --

MR. WHITE: No, I don't think there is any automatic rule in effect here. . . .[17/]

Because Johnson III made clear even prior to Clemons that, whatever Mississippi's pre-Stringer redemptive practice may have been, Mississippi's current practice is not to rely upon an "automatic affirmance," under the Erie doctrine the Fifth Circuit should have applied Johnson III regardless of whether Clemons is "new law" as compared with

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17/ See Transcript of oral argument in Clemons, at 22-23 (emphasis added) (D1-5).

Stringer.[18] Petitioner should not be deprived the benefit of Johnson III simply because a federal court applying earlier ambiguous state court rulings incorrectly interpreted those state court rulings to require a result subsequently held unconstitutional.[19]

2. A change in state law does not implicate Teague v. Lane concerns

Clearly, a decision of the Mississippi Supreme Court which either changes or clarifies existing state law cannot impose a new obligation upon Mississippi, and therefore be subject to the non-retroactivity rule of Teague v.

18/ See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); see also Lindley v. Hamilton, 883 F.2d 360, 362-63 (5th Cir. 1989); Muniz v. Procunier, 760 F.2d 588, 589-90 (5th Cir.), cert. denied, 474 U.S. 934 (1985).

19/ This Court in Clemons made no specific finding regarding the status of Mississippi law. Clemons, ___ U.S. at ___, 110 S. Ct. at 1450.

Lane -- Mississippi has imposed any such new obligation upon itself. The due respect for comity which is the rationale underlying Teague therefore requires a result directly opposite from the result obtained by ignoring Johnson III. Put another way, a change in state law does not implicate Teague v. Lane concerns. A due respect for comity requires that the Mississippi Supreme Court be given the opportunity to take appropriate action under current Mississippi law.[20/]

B. Mississippi Specifically Permits Habeas Petitioners To Rely On "New Law"

The Mississippi legislature has legislated a result directly contrary to Teague in its Post-Conviction Collateral Relief Act, under which specifically

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20/ See Maynard v. Cartwright, 486 U.S. 356, 365 (1988); Zant v. Stephens, 456 U.S. 410 (1982); Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); Muniz, 760 F.2d at 589-90.

"excepted from [the prohibition on successive petitions] are those cases in which the prisoner can demonstrate either that there has been an intervening decision of the supreme court of either the state of Mississippi or the United States which would have actually adversely affected the outcome of his conviction or sentence . . ." Miss. Code Ann. § 99-39-27(9) (Supp. 1988). See also Miss. Code Ann. § 99-39-23(6) (Supp. 1988). It is manifestly the case that the Mississippi legislature may choose a different rule than that promulgated in Teague. See Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715, 2718 (1990) (Teague is not jurisdictional).

Obviously, the "intervening decision of the supreme court of . . . the United States" in Clemons v. Mississippi, and of the Mississippi Supreme Court in Johnson

III, "actually adversely affect the outcome of [Petitioner's] . . . sentence." Therefore, under Mississippi law Petitioner is entitled to rely on Johnson III and Clemons notwithstanding the non-retroactivity principle announced in Teague v. Lane.[21/]

C. Clemons Did Not Announce A New Rule

1. The right to individualized treatment is settled law

At the outset, it is critical to recognize that the issue accepted for review in Clemons v. Mississippi -- "[d]oes the Eighth Amendment permit an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority

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21/ See Neal v. State, 525 So. 2d 1279, 1288 (Miss. 1987) (applying intervening decision); Billiot v. State, 515 So. 2d 1234 (Miss. 1987) (same); Johnson v. State, 508 So. 2d 1126, 1128 (Miss. 1987) (same); Irving v. State, 498 So. 2d 305, 315 (Miss. 1986) (same), cert. denied, 481 U.S. 1042 (1987).

for capital sentencing under state law rests exclusively with the jury?" -- necessarily assumes that the State in Clemons did not apply an "automatic affirmance" rule. Indeed, as noted above, when the "automatic affirmance" issue was raised during oral argument before the United States Supreme Court in Clemons, counsel for the State of Mississippi repeatedly argued that Mississippi has no "flat, automatic rule."

This history is important, because it puts in context this Court's reference in Clemons -- a post-Teague case -- to the invalidity of an "automatic affirmance" rule. Without fanfare, the Court simply observed that requiring individualized weighing of all mitigating factors and valid aggravating circumstances was mandated by, and has been settled law

since Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982).[22/]

Indeed, this Court plainly recognized that the invalidity of an automatic affirmance rule is unaffected by Teague in Stringer v. Black, ___ U.S. ___, 110 S. Ct. 1800 (1990), when it granted the writ of certiorari, vacated the Fifth Circuit's judgment in Stringer v. Jackson, 862 F.2d 1108 (5th Cir. 1988), and remanded Stringer for reconsideration in light of Clemons. See also Hill v. Black, ___ U.S. ___, 111 S. Ct. 98 (1990) (remanding to Fifth Circuit for reconsideration in light of Clemons despite argument by the State that Clemons was held non-retroactive in Smith v. Black). Logically, had there been a

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22/ See Clemons, ___ U.S. at ___, 110 S. Ct. at 1450; see also Penry v. Lynaugh, ___ U.S. ___, 109 S. Ct. 2934, 2944-47 (1989).

retroactivity problem with Clemons, this Court would have either denied the writ of certiorari, or, at a minimum, remanded with specific instructions to consider the Teague issue.[23/]

2. Under the central principle of Clemons this case should be remanded to the Mississippi Supreme Court

Clemons is only important to the present litigation because the Mississippi Supreme Court in Smith v. State[24/] erred in finding no Godfrey[25/] violation in the use of the "especially heinous, atrocious or cruel" aggravating circumstance,[26/] and accordingly made no

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23/ See Zant v. Moore, 489 U.S. 836 (1989). Alternatively, the Supreme Court's remand in Stringer must evidence the Court's view that a state may waive the Teague v. Lane defense. See Point II.E.

24/ 419 So. 2d 563 (Miss. 1982).

25/ See Godfrey v. Georgia, 446 U.S. 420 (1980).

26/ See Maynard v. Cartwright, 486 U.S. 356 (1988).

effort to determine the validity of Petitioner's death sentence in light of that violation. See Smith, 419 So. 2d at 568, 574. Therefore, under the central principle in Clemons, the Fifth Circuit should have given the Supreme Court of Mississippi the opportunity to decide, in the first instance, whether Petitioner's death sentence should be carried out despite the invalidity of one of its aggravating circumstances.[27/] Clearly, granting the Mississippi Supreme Court the opportunity to clarify and apply its appellate review procedures after a finding of constitutional error, as this

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27/ See Clemons, ___ U.S. at ___, 110 S. Ct. at 1451. See also Maynard v. Cartwright, 486 U.S. 356, 365 (1988); Zant v. Stephens, 456 U.S. 410 (1982); Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); De La Rosa v. Lynaugh, 817 F.2d 259, 268 n.17 (5th Cir. 1987) ("The process by which the state elects, or is required by law, to reform De La Rosa's sentence is a matter of state law").

Court did in Clemons, cannot implicate Teague v. Lane concerns."[28/]

Moreover, even assuming arguendo that there was a change in Mississippi law caused by Clemons v. Mississippi, that change was not of the type contemplated by Teague. The constitutional error in Clemons was that the jury relied upon a vague aggravating circumstance, in violation of the Eighth Amendment as interpreted in Godfrey v. Georgia, 446 U.S. 420 (1980). The alleged automatic affirmance rule was an attempt by the

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28/ Alternatively, the Fifth Circuit should have certified the following two questions to the Mississippi Supreme Court: (1) did Johnson III and/or Clemons v. Mississippi represent (in the case of Johnson III) and/or require (in the case of Clemons) a change in Mississippi law with respect to the effect of an invalid aggravating circumstance; and (2) if Johnson III and/or Clemons did represent/require a change in Mississippi law, does Mississippi law nevertheless entitle a habeas defendant to rely upon that new law? See Selvage v. Collins, 897 F.2d 745 (5th Cir. 1990); see also supra note 21.

appellate court to cure the Godfrey error. Again, the interest in comity which underlies Teague is not violated by giving a state the opportunity to clarify and apply its appellate review procedures after a finding of constitutional error.

D. Clemons Constitutes An Exception To Teague v. Lane

Petitioner submits that the portion of Clemons on which he relies implicates bedrock procedural elements crucial to the accuracy of the determination of whether Petitioner should have been sentenced to death. Indeed, virtually all of the evidence presented by the prosecution during the sentencing hearing -- including the evidence of rape[29/] --

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29/ This rape charge was utterly unexpected. The indictment charged robbery-murder. It did not charge rape, although rape-murder is a capital crime. At no time in the voir dire or in the guilt phase did the prosecutor claim that Petitioner raped the victim. Indeed, the prosecutor carefully avoided any

(continued...)

was admissible solely in support of the unconstitutional aggravating circumstance. This portion of Clemons therefore constitutes an exception to Teague v. Lane.[30/]

Indeed, both Maynard and Clemons implicate the most fundamental rule of Eighth Amendment jurisprudence: capital sentencing procedures must "provide a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'" Godfrey, 446 U.S. 420, 427

29/(...continued)
such claim because, as he candidly admitted, he could not prove rape. (E111-15). All reticence disappeared, however, at the sentencing hearing.

30/ See Teague, 489 U.S. at 307, 311-16; see also Saffle v. Parks, ___ U.S. ___, 110 S. Ct. 1257, 1263 (1990) ("watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" are applied retroactively despite their novelty).

(1980) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972)).

In Lewis v. Jeffers, ___ U.S. ___, 110 S. Ct. 3092 (1990), decided after the Fifth Circuit issued its opinion, this Court stated:

> Our capital punishment doctrine is rooted in the principle that "'[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed'" . . . . "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."
>
> This principle requires a State to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Jeffers, ___ U.S. at ___, 110 S. Ct. at 3099 (citations omitted).

In Walton v. Arizona, ___ U.S. ___, 110 S. Ct. 3047 (1990), also decided after the Fifth Circuit issued its opinion in the present case, Justice Scalia underlined the centrality of the principle of limited discretion in capital sentencing:

> [W]e have routinely read Furman as standing for the proposition that "channeling and limiting . . . the sentencer's discretion in imposing the death penalty" is a "fundamental constitutional requirement," Maynard v. Cartwright, 486 U.S. 356, 382 (1988), and have insisted that States furnish the sentencer with "'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Walton, ___ U.S. at ___, 110 S. Ct. at 3060-61 (Scalia, J., concurring).

This Court could not send a clearer signal that the Godfrey/Maynard/Clemons line of cases, which enforces the central principle of Eighth Amendment jurisprudence, implicates bedrock

procedural elements which must be applied on habeas review of death sentences.

E. Respondent Has Waived Any Teague v. Lane Argument

Respondent's brief to the Fifth Circuit discussed neither the retroactivity of Maynard nor the Teague decision, though it post-dated both. Further, in a supplemental brief filed this spring, after Clemons, Respondent again failed to mention Teague or to suggest that there was any question regarding the retroactivity of Maynard or Clemons. Respondent has therefore waived its right to rely on the Teague doctrine in this case.[31/] The only two circuits to embrace the idea that Teague may be

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31/ See Collins v. Youngblood, ___ U.S. ___, 110 S. Ct. 2715, 2718 (1990); Hanrahan v. Greer, 896 F.2d 241, 245 (7th Cir. 1990); see also Mayo v. Lynaugh, 893 F.2d 683, 686-87 (5th Cir. 1990) (state waived issue of procedural default by waiting until filing of petition for rehearing to raise the claim).

raised sua sponte do so either without careful reasoning or for reasons that are inapplicable here.[32/] In the year that has passed since these decisions, the Teague doctrine has become sufficiently well established that Respondent has waived the issue by failing to raise it.

Moreover, in both Stringer and Clemons, Respondent argued that Mississippi had been performing a reweighing/harmless error analysis as a matter of Mississippi law. Accordingly, Respondent should be barred from asserting that Maynard and Clemons constitute new rules in Mississippi under the doctrine of judicial estoppel, which bars a party from advocating a position in one forum that is contrary to a

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32/ See Hill v. McMackin, 893 F.2d 810, 813 (6th Cir. 1989) (no reason given); Hopkinson v. Shillinger, 888 F.2d 1286, 1288 (10th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3256 (1990) (Teague still novel).

position it asserted in a different forum. See, e.g., USLIFE Corp. v. United States Life Ins. Co., 560 F. Supp. 1302, 1305 (N.D. Tex. 1983).

Even before his direct appeal became final, it was unconstitutional under Godfrey for Petitioner's jury to have received a naked "especially heinous, atrocious or cruel" instruction. See Davis v. Maynard, 911 F.2d 415, 418 (10th Cir. 1990); Newlon v. Armontrout, 885 F.2d 1328, 1333 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 3301 (1990). Moreover, Mississippi itself has made clear that it has no "automatic affirmance" rule. Petitioner, therefore, suggests that the Court grant certiorari to determine that Johnson III and Clemons are not subject to Teague v. Lane, or at least that the Mississippi Supreme Court should be given the first opportunity to

decide how best to cure the Godfrey error at Petitioner's trial.

CONCLUSION

For all the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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